IN THE SUPREME COURT

On Appeal from the Michigan Court of Appeals
Special Conflict Panel
Murphy, CJ, Markey, O'Connell, Talbot, Meter, Borrello, and Beckering, JJ

SUSAN FURR and WILLIAM FURR,

Plaintiffs-Appellees / Cross-Appellant,

vs.

MICHAEL McLEOD, M.D., TARA B. MANCL, M.D., MICHIGAN STATE UNIVERSITY KALAMAZOO CENTER FOR MEDICAL STUDIES, INC., and BORGESS MEDICAL CENTER, Jointly and Severally,

Defendants-Appellants / Cross-Appellees.

Supreme Court Docket No. 149344

Court of Appeals Docket No. 310652

Kalamazoo County Circuit Court
Case No. 10-0551-NH

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DEFENDANTS/CROSS-APPELLEES' BRIEF IN OPPOSITION TO PLAINTIFF / CROSS-APPELLANT'S CROSS-APPLICATION FOR LEAVE TO APPEAL

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COUNTER-STATEMENT OF QUESTION INVOLVED

I. **SHOULD THE COURT ALLOW PLAINTIFFS TO COLLATERALLY ATTACK THE OCTOBER 24, 2013, OPINION OF THE COURT OF APPEALS REJECTING PLAINTIFFS' UNPRESERVED ISSUE REGARDING THE APPLICATION OF MCL 600.2912b(9)?**

Plaintiffs-Appellees/Cross-Appellants say: "Yes"

Defendants-Appellants/Cross-Appellees say: "No"

COUNTER-STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

With their Cross-Application, Plaintiffs are requesting that this Court review a separate Order than the one that is the subject of Defendants' Application. Plaintiffs untimely seek review of the Court of Appeals' October 24, 2013 Order in which the Court of Appeals rejected an untimely, unpreserved argument raised by Plaintiffs – that they were not required to wait 182 days after serving their Notice of Intent ("NOI") to file their medical malpractice complaint pursuant to MCL 600.2912b(9). That statute allows early filing if a claimant receives written notice that a health care provider does not intend to settle the claim during the NOI period.

Plaintiffs have acknowledged throughout this litigation that they did not wait 182 days after serving their Notice of Intent before filing their medical malpractice lawsuit. In their Response to Defendants' Motion for Summary Disposition, they requested that the Court (i) issue an Order indicating the filing was timely, arguing that Defendants failed to file an NOI Response or (ii) disregard the error. See "Plaintiff's [sic] Response to Defendants' Motion for Summary Disposition", p 2. In their Brief, Plaintiffs mentioned offhandedly that the NOI Response indicated Defendants did not intend to settle the case, allowing them to file before the expiration of the 182-day waiting period, but did not actually make an argument or provide any authority. See "Brief in Support of Plaintiff's Response to Defendants' Motion for Summary Disposition", p 2; MCL 600.2912b(9).

Moreover, Plaintiffs' acknowledged that they did not actually rely on MCL 600.2912b(9): "In this case, Plaintiff's complaint was **inadvertently** filed one day early." See "Brief in Support of Plaintiff's Response to Defendants' Motion for Summary Disposition", p 8 (emphasis supplied). Retrospectively, though, they concluded that they could have avoided the waiting period because Defendants denied liability in the NOI Response. They did not argue that the postscript, which indicates "if necessary" defense counsel would accept service of "any summons and complaint which [plaintiffs] may file" (see Response to Notice of Intent, September 7, 2010) set forth a basis for violating the 182-day waiting period.

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The trial court denied Defendants' Motion, setting forth its reasoning verbally from the bench. It determine that Defendants were not prejudiced by the early filing, so pursuant to *Zwiers v Growney*, 286 Mich App 38, 778 NW2d 81 (2009), the defect should be ignored. (Transcript, Jan. 18., 2011 hearing on Defendants' Motion for Summary Disposition, p 21.)

Defendants filed an Application for Leave to Appeal with the Court of Appeals. Plaintiffs' Response did not argue that the postscript provided a basis for ignoring the 182-day waiting period. Following the Court's decision in *Driver v Naini*, 490 Mich 239, 802 NW2d 311 (2011), the Court of Appeals, in lieu of granting leave, vacated the trial court's opinion and remanded to the trial court for reconsideration in light of *Driver*.

The parties submitted supplemental briefing to the trial court. Plaintiffs did not argue in their supplemental briefing that the postscript allowed them to avoid the 182-day period.

The trial court again denied Defendants' Motion. Defendants again sought review, simultaneously filing an Application for Leave to Appeal and a Motion for Immediate Consideration.

The Court of Appeals granted Defendants' Motion for Immediate Consideration and granted Leave, "**limited to the issues raised in the application and supporting brief.**" See Court of Appeals Order, June 22, 2012 (Docket No. 310652). It was not until Plaintiffs filed their Brief on Appeal that they argued the postscript excused the premature filing. Another new argument was that the section entitled "General Reservation of Defenses", which asserted that serving the Response was not intended to be a waiver of any defenses, allowed Plaintiffs' to retrospectively invoke MCL 600.2912b(9) to excuse their premature filing.

Prior to the Panel's decision in *Furr*, a different panel issued *Tyra v Organ Procurement Agency of Mich*, 308 Mich App 208, 840 NW2d 730 (2013), which held the statute allowing amendment of pleadings, MCL 600.2301, could be used to ignore a premature filing error or amend the filing date of a complaint. The panel in *Furr* was bound to follow *Tyra*, but requested the convening of a conflict panel. *Furr v McLeod*, 303 Mich App 801 (2013).

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The Court of Appeals noted that Plaintiffs failed to preserve the issue of whether MCL 600.2912b(9) could be used to avoid the 182-day period. See *Furr*, 393 Mich App at *11. As such, the issue was reviewed for "plain error affecting the Furrs' substantial rights." *Id.* It concluded "that the trial court did not plainly err by failing to apply MCL 600.2912b(9) to the facts of this case." *Id.* The notice of defenses, the Court noted, "may give the plaintiff an idea of the defendants' claims and assist them in preparing for settlement negotiations." *Id.* at *11-12. And of course, the postscript was "nothing more than a polite informational statement concerning on whom the plaintiffs should serve a summons and complaint, if necessary." *Id.* at *12. The Court noted that – at best – the statements in the NOI Response made in addition to those required by statute amounted to "implications" that Defendants would not settle; "nothing about the healthcare providers' response informed the Furrs that the healthcare providers did not intent to settle the claim." *Id.*

Plaintiffs did not seek Leave to Appeal that portion of the Court of Appeals' Order with this Court. Plaintiffs also did not raise the issue or otherwise assert MCL 600.2912b(9) in a Supplemental Brief to the Conflict Panel.

The Conflict Panel, by a narrow margin, affirmed *Tyra* and the trial court's denial of Defendants' Summary Disposition Motion. That Opinion did not address the unpreserved issue of whether MCL 600.2912b(9) could be used to excuse the premature filing.

Defendants filed an Application for Leave to Appeal the April 10, 2014, ruling of the Conflict Panel, which is currently pending.

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ARGUMENT

I. STANDARD OF REVIEW

In the event this Court granted Plaintiffs' untimely Application for Leave to Appeal the October 24, 2013, Opinion of the Court of Appeals, it would be reviewing an unpreserved issue. Unpreserved issues are reviewed on appeal for clear error:

> Because this argument was not raised in the trial court, it is not preserved. Thus, our review is limited to determining whether a plain error occurred that affected substantial rights. *Veltman v. Detroit Edison Co.*, 261 Mich.App. 685, 690, 683 N.W.2d 707 (2004). " 'To avoid forfeiture under the plain error rule, three requirements must be met: 1) the error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights.' " *Kern v. Blethen–Coluni*, 240 Mich.App. 333, 336, 612 N.W.2d 838 (2000), quoting *People v. Carines*, 460 Mich. 750, 763, 597 N.W.2d 130 (1999).

In re Smith Trust, 274 Mich App 283, 285-286; 731 NW2d 810 (2007).

II. THE COURT SHOULD NOT ALLOW PLAINTIFFS TO COLLATERALLY ATTACK THE OCTOBER 24, 2013, OPINION OF THE COURT OF APPEALS REJECTING PLAINTIFFS' UNPRESERVED ISSUE REGARDING THE APPLICATION OF MCL 600.2912b(9).

A. Plaintiffs' Application should be denied because it is untimely.

An application for leave to appeal must be filed within 42 days after (i) the Court of Appeals clerk mails notice of an order entered by the Court of Appeals, (ii) the filing of the opinion appealed from or (iii) the Court of Appeals clerk mails notice of an order denying a timely filed motion for rehearing. See MCR 7.302(C)(2).

The Rules specify: "Late applications **will not** be accepted except as allowed under this subrule." MCR 7.302(3). Although there are exceptions for criminal cases, and special provisions governing cases in which the Court of Appeals remands for further proceedings, there is no exception that allows a prior order to be appealed in a "cross appeal".

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Plaintiffs did not file an Application for leave to appeal the October 24, 2013, Order and are now seeking to piggy back on Defendants' Application. However, because they failed to Appeal that portion of the Court of Appeals decision, any challenge to that issue should be deemed waived.

Defendants are not seeking review of the October 24, 2013, Order or any issue therein.[1] Rather, Defendants' Application is limited to the Opinion issued by the Conflict Panel on April 10, 2014. The Appeal in this case should be limited to the issues raised in that Application.

B. Plaintiffs' Application should be denied because they have not (i) demonstrated grounds for the application or (ii) good cause.

Even assuming the Application was timely, it should be denied. To invoke the Court's discretionary review on an Application, the party seeking review must demonstrate:

* * *

> (3) the issue involves legal principles of major significance to the state's jurisprudence;
>
> * * *
>
> (5) in an appeal from a decision of the Court of Appeals, the decision is clearly erroneous and will cause material injustice or the decision conflicts with a Supreme Court decision or another decision of the Court of Appeals...

The issue raised in **Defendants'** Application – to wit, whether a court can disregard a legislative mandate requiring a medical malpractice plaintiff to wait 182 days after serving the Notice of Intent before filing a medical malpractice lawsuit – certainly meets the criteria set forth in subsection 3. Plaintiffs here, however, raise a different issue – the interpretation of MCL 600.2912b(9). Unlike the issues raised by Defendants', which has been the subject of significant conflict among the trial courts and various panels of the Court of Appeals for years, the

[1] In fact, per MCR 2.715(J)(5), that Opinion was vacated. (See Court of Appeals Order, Nov. 20, 2013, Docket No. 310652, (Exhibit 1).).

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exception set forth in §2912b(9) has little significance, legally or practically. Finally, the Court of Appeals decision as to the non-applicability of §2912b(9) was not "clearly erroneous" – it was correct, as explained below.

Assuming the Court grants Defendants' Applications and transforms Plaintiffs' Motion into one brought pursuant to MCR 7.302(H)(4)(b), it should still be denied. While that subrule allows the Court to grant a request to add additional issues, the party seeking to add issues must first demonstrate "good cause". Plaintiffs failed to demonstrate "good cause" for several reasons. First, they had the opportunity to seek review both from this Court following the October 24, 2013 Opinion and from the Conflict Panel – they did not. Their dilatory conduct should preclude review.

Second, and relatedly, this issue was never raised at the trial court level, nor was it raised in response to Defendants' First Application for Leave to Appeal from the trial court's Order. It was (and is) unpreserved. Therefore, the review was (and is) limited to clear error. Plaintiffs have not argued that the trial court (or the Court of Appeals) committed clear error by not applying MCL 600.2912b(9) to the facts of the case, leading to the third reason the application should be denied.

Plaintiffs' argument lacks merit. The 182-day period can be avoided if a health care provider (i) informs the claimant (ii) in writing (iii) that the health professional or health facility does not intend to settle the claim (iv) within the applicable notice period:

> If at any time during the applicable notice period under this section a health professional or health facility receiving notice under this section informs the claimant in writing that the health professional or health facility does not intend to settle the claim within the applicable notice period, the claimant may commence an action alleging medical malpractice against the health professional or health facility, so long as the claim is not barred by the statute of limitations.

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MCL 600.2912b(9). Here, Plaintiffs rely on three aspects of Defendants' NOI Response in arguing that §2912b(9) applies: (i) the general reservation of defenses, (ii) the assertion of "no liability" defenses, and (iii) a postscript indicating the trial attorney will accept service "if necessary". The argument fails.

The plain language of §2912b(9) does not allow it to be invoked by implication. Rather, there must be an express statement made by the health care provider to the claimant indicating that the health care provider does not intend to settle during the notice period. Making vague statements in an NOI that imply (or lead a claimant to assume) the drafter is considering future litigation does not satisfy the statute.

The "General Reservation of Defenses" reserves defenses. This is simply precautionary language to guard against a claimant later asserting that defenses not raised are waived in the event a lawsuit is filed. In the NOI Response in this case, that section also specifically advised Plaintiffs that their NOI was defective, and therefore, the statute of limitations may not be tolled. Nothing in that section is a written statement from the health care provider to the Plaintiffs indicating there would be no settlement during the 182-day period.

The denial of liability in the body of the NOI Response is not a written statement of an intent not to settle. The purpose of an NOI Response is to advise a claimant of the defenses to the claim. Compliance with the mandates of MCL 600.2912b(7) cannot be considered to fulfill the criteria of §2912b(9) or else in every single case where a defense to liability was asserted the claimant would be able to avoid the waiting period.

Finally, the postscript does not satisfy §2912b(9): "**If necessary**, please serve any summons and complaint which you may file on me instead of Dr. McLeod or Dr. Mancl. I will accept service for both of them as well as for MSU-KCMS and Borgess. Thank you for your

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courtesy in that regard." The qualifying phrase "if necessary" precludes Plaintiffs' interpretation from being correct. In fact, it suggests the opposite – that filing a Complaint may not be necessary.

Even when read as a whole, the NOI Response cannot be considered a written statement of an intent not to settle. It did what it was supposed to do – put claimant on notice of potential defenses. The addition of a courtesy remark regarding service "if necessary" does not transform the Response to an invitation to file a lawsuit. Moreover, even if at best it can be considered ambiguous (which it cannot), the contrary interpretation certainly cannot be considered "clear error".

RELIEF REQUESTED

Because the Application is untimely and lacks merit, Defendants respectfully request that this Court DENY Plaintiffs' Application for Leave to Appeal.

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